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VOL. 29 NOVEMBER, 1953 No. 2

President's Page

By W. I. Gilbert, Jr.
President, Los Angeles Bar Association

W. I. Gilbert, Jr.

THE Convention at Monterey was an outstanding success, both from a business as well as a social viewpoint. The Conference of Delegates was held on Monday and Tuesday before the Convention opened on Wednesday. The Delegates worked hard both days, and until eleven p.m., Tuesday night. The attendance of our Delegates was excellent, and during a large part of the Tuesday night session, ours was the only delegation of any size that had 100% attendance.

The Los Angeles Bar Association proposed and sponsored six propositions, all of which were approved.

The Association is proud and grateful to have been so competently represented.

In this issue is an article discussing retirement of the self-employed by income tax deferment. The present high level of income taxes coupled with the system of graduated rates poses a serious problem to the professional man, whose income characteristically fluctuates widely and is at its peak over a relatively short period. This article is therefore timely and should stimulate informed and constructive attention to this problem among lawyers.

Retirement For Self-Employed Through Income Tax Deferment

By Marvin E. Rex.* and M. Craig Medoff**

Marvin E. Rex

M. Craig Medoff

Man has long recognized the advisability of saving the good fruit of his present labors to secure a safer future for himself. If a man fails in his efforts to store up sufficient savings for use in the days when he is no longer able to earn for reasons beyond his control, he must then depend upon charity. Every individual failure weakens society, not only in an economic sense, but morally as well. It follows then that society can best serve itself by removing the causes of individual failure.

As our society becomes more complex, as our standards of living rise, as science lengthens the span of life and consequently lengthens the period of old age, it becomes ever more important to develop a sound system by which the individual can and will adequately provide for retirement or emergency.

FEDERAL SOCIAL SECURITY PROGRAM. Much has been done privately and through government to provide for security in later life. The *Federal Social Security Program* is the most advertised example of past efforts in this country. Perhaps the security of all citizens can be assured within the framework of the Federal Program, but many people are against the program because they assert:

1. The benefits are not directly dependent upon individual

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contributions and, consequently, the system is actuarily unsound and dangerous to our economic stability.

2. The Government is bound to pay the promised sums and all must bear the burden; yet, all are not eligible to participate in the benefits.
3. A savings system administered by the government is a dangerous concentration of power. Government administration is unnecessary, and is more liable to waste and inefficiency than a private system.
4. Income tax is not deferred on individual contributions.
5. Self-employed professionals are not covered; present benefits would prove insufficient for their retirement even if they were covered.

RETIREMENT BONDS. In 1947 a plan for individual tax deferments was suggested to the Tax Committee of Congress. Under it, each taxpayer would be allowed to exclude from his gross income a fixed percentage of his earned net income if it were invested in a special, non-assignable, low or no interest-bearing government bond. The proceeds of the bonds were to be included in the taxpayer's income, or that of his beneficiary, only when the bonds were cashed. There was to be no limitation on the time of cashing. The bonds would be called "R" bonds or "Retirement" bonds.

This proposal was adversely criticized primarily on the ground that if the bonds were not to bear interest, the taxpayer would be as well off if he paid the current income tax and invested the remaining income at going interest rates. Since the bonds could be cashed at any time, the retirement protection was impaired.

It is suggested that the bond proposal could be amended to meet such criticisms by increasing the interest rates and establishing safeguards to prevent their indiscriminate and premature cashing. Then, too, the fifteen per cent of earned income limit now used by the Federal Internal Revenue Code for profit-sharing plans could also be applied to these bonds, thus, equalizing the benefits for both large and small income groups and answering the criticism that those who need deferred income benefits least are the ones most able to attain them.

RESTRICTED PENSION FUNDS. On May 13, 1952, the Committee on Ways and Means of the House of Representatives held a hearing on the Keogh-Reed Bills, H.R. 4371 and H.R. 4373. These bills

(Continued on page 43)

Inferences From Refusal to Answer Questions Concerning Communist Affiliation

By Arthur N. Greenberg**

INTRODUCTION

Arthur N. Greenberg

It is judicially recognized that "the label of 'communism' today in the minds of many average and respectable persons places the accused beyond the pale of respectability and makes him a symbol of public hatred." [1]

During hearings conducted by Congressional Investigating Committees, numerous persons have been asked questions regarding their membership in the Communist Party. If an admission of communist affiliation so places one "beyond the pale," does a refusal to answer under claim of the privilege against self-incrimination raise the inference of party membership; and is such an inference judicially recognized?

THE PRIVILEGE

The privilege against self-incrimination is established in the Fifth Amendment to the United States Constitution as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

It is not doubted today that a witness can invoke the privilege against self-incrimination before a Congressional Investigating Committee[2] and refuse to state whether he is, or ever was, a member of the Communist Party.

INFERENCES — EXTRA JUDICIAL

(a) ATTITUDE OF PUBLIC.

In July, 1952, a poll was taken in Muncie, Indiana, to determine what inferences are drawn from the refusal of a witness to answer

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**Of the Los Angeles Bar; admitted to the State Bar of California, January 1953.

1*Spanel v. Pegler*, 160 F. 2d 619, 662 (7th Cir. 1947); *accord*, *Utah State Farm Bureau v. National Farms Union Service Corp.*, 198 F. 2d 23 (10th Cir. 1952); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951); *Gallagher v. Chavales*, 48 Cal. App. 2d 52, 119 P. 2d 408 (1941); *Cole v. Loew's Incorporated*, 8 F. R. D. 508 (S. D. Cal. 1948); *Leow's Incorporated v. Cole*, 185 F. 2d 641 (9th Cir. 1950); *United States v. Rosenburg*, 195 R. F. 2d 583 (2d Cir. 1952).

2*United States v. Yukio Abe*, 95 F. Supp. 991 (D. C. Hawaii 1950); *United States v. Emspak*, 95 F. Supp. 1012 (D. C. Dist. Col. 1951).

questions concerning his membership in the Communist Party under claim of the privilege against self-incrimination.[3] Muncie, Indiana, was selected as the community in which to take the poll because it is regarded by Social Scientists generally as possessing the characteristic elements of the American population and one which would give a fair test of the entire United States. The poll was used in connection with *R.K.O. Radio Pictures, Inc. vs. Paul Jarrico*,[4] then pending in the Superior Court of Los Angeles County.

Interviews of 531 persons were taken according to approved statistical methods. One of the questions asked was as follows:

> "When an individual, whom earlier witnesses have named as a communist, is called before the House Committee of Un-American Activities and refuses to state whether he is or ever has been a communist on the grounds that his answer might tend to incriminate him, does it make you believe that he is a communist?"

The following answers were given in response to the above question:

Yes	365	68.7%
No	161	30.3%
No opinion	5	1%

It was also asked whether the person interviewed would believe that the witness was a communist, if his refusal to answer under the claim of the privilege occurred fifteen months earlier. To this question, 360 or 67.8% of the persons interviewed said that they would believe that the witness was a communist; 164 or 30.9% stated that they would not so believe; 7 persons or 1.3% had no opinion.[5]

On the basis of this poll, slightly more persons drew inference of Communist Party membership from claim of the privilege in 1952 than 15 months earlier.

(Continued on page 53)

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[3]This poll was devised by Attorney Arthur Groman, Dr. Floyd L. Ruch, professor of psychology at the University of Southern California and president of Psychological Services, Inc., and Dr. Glenn Grimsley, Vice President and director of research of Psychological Services, Inc.

[4]Superior Court of Los Angeles County, No. 597008.

[5]*RKO Radio Pictures, Inc. v. Jarrico*, Superior Court of Los Angeles County, *supra*, Vol. III, Reporter's Daily Transcript, p. 59-129.

Brothers-In-Law

And What They Are Doing in OTHER BAR ASSOCIATIONS

By George Harnagel, Jr.

George Harnagel, Jr.

There has been a good deal of criticism in recent years of the manner in which hearings have been conducted by Congressional committees, particularly those committees which have been exercising the investigatory powers of the Congress, and various suggestions have been made, both in and out of Congress, for some sort of reform. The Bar Association of the **District of Columbia** has been particularly concerned with this problem and some months ago set up a Special Committee on Legislative Investigation to study and report with respect to rules of procedure for Congressional hearings.

The Committee has now reported, recommending that rules of procedure framed by the committee and incorporated in its report be adopted by all Congressional investigating committees. The report and recommendation have been unanimously adopted by the board of directors of the Association and it is anticipated that the Association will request a hearing upon them by appropriate committees of the House and Senate.

The Committee's report is too long to reproduce here, but certain portions are quoted below (their order has been changed slightly) and following them the proposed rules of procedure are set forth in full.

"In recent years the Congress has become more and more aware of alleged abuses in the exercise of its investigatory powers and in the conduct of its Committee hearings. Much criticism both from the public and members of the Congress has been made of the conduct as well as the motive and purpose back of some of the investigations. . . .

"The Constitution contains no express provision authorizing

Congressional investigation. However, even before the Constitution was adopted, the Colonies made investigations for their individual legislative purposes. After 1787 the Congress began to initiate and conduct investigations principally as an aid to legislation, but in many instances to ascertain facts as to the official conduct of Governmental functions. As early as 1792, the House of Representatives conducted investigation of the conduct of General St. Clair. The first Senate investigation with subpoena power was made of the Seminole Indian Campaign of General Jackson in 1818. Although the Constitution contains no express authorization for investigations, it early was understood and has since been recognized as a functional power of the Congress to investigate for legislative purposes. Such power is now so firmly established as to admit of no doubt. . . .

"There is no specific set of rules for the organization and conduct of hearings applicable to all Congressional committees. Each committee often makes its own rules of procedures with no announced rules of conduct. To remedy what is believed to be a defective procedure many members of the Congress have during recent years introduced bills and resolutions suggesting definite rules of conduct to be adopted by the Congress to guide and control all committees in the exercise of their investigatory function. . . .

"We have assumed the basic position that it is the duty and obligation of witnesses and counsel to cooperate fully with committees of the Congress in the exercise of their proper and legal investigations. Concurrently, witnesses must be protected against badgering, abuse, harassing, and unnecessary embarrassing treatment either by members of the committee or its staff; and when lawyers are called as witnesses the confidential relationship with their client must be respected. Any rules must also protect the character, integrity and reputation of other persons from being unfairly attacked by unscrupulous witnesses using hearsay, rumor, gossip and similar unsupported information.

"These proposed rules grant certain rights to witnesses and counsel and impose specific limitations on Congressional Committees. It is, therefore, a twofold operation which we are recommending should be adopted by every Committee of Congress before it commences operations. The rules proposed should be

(Continued on page 59)

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of September and October 1928, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

Thomas C. Ridgway has been elected president of the State Bar, succeeding **Joseph J. Webb** who piloted the organization through its first year of existence. The Los Angeles members of the new Board of Governors will be **Alfred L. Bartlett, Thomas C. Ridgway, Frank James** and **Leonard B. Slosson.** President Ridgway was the outgoing president of the old California Bar Association which was taken over by the California State Bar a year ago.

* * *

Franklin D. Roosevelt, in accepting the Democratic nomination for Governor of New York, has endorsed Governor **Alfred Smith's** state-power development views.

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Seventy-four members of the New York bar have been named for disciplinary action for ambulance chasing in a report made to the Appellate Division of the Supreme Court. It has been recommended that contingent fees be limited to one-third of the sum recovered.

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The Yankees beat the Cardinals four games straight in the World Series.

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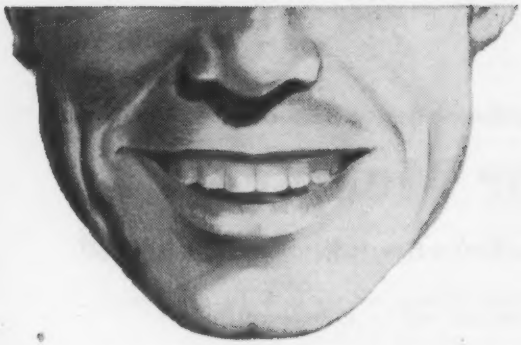
County Registrar **W. M. Kerr** reports the registered voters of Los Angeles City and County (combined) as: Republicans — 529,026; Democrats — 187,020; Socialists — 5,571; Prohibitionists—11,485; Decline to State—69,633.



Naturally, YOU are the one we want to please!

Why? Because we believe that you, as an attorney, want your client to benefit from the best possible service in the management of his trust or estate. By pleasing you, we cannot fail to satisfy your client. We also try to relieve you of all burdensome tasks, but welcome your advice and participation when problems arise with which you are familiar.

Dynamic Trust Management

Bank of America
NATIONAL TRUST AND SAVINGS ASSOCIATION
MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

RETIREMENT FOR SELF-EMPLOYED

(Continued from page 36)

allow postponement of income tax on income set aside for retirement by any individual, self-employed or otherwise, if he is not already a member of a plan established by an employer and qualifying under Section 165 of the Internal Revenue Code, or he is not eligible to become a member of such plan. The individual taxpayer is permitted to exclude from his gross income annually ten per cent of his earned income, up to $7,500, if said income is paid into a qualified, restricted retirement fund. The aggregate exclusion permissible during the taxpayer's lifetime is set at $150,000. The restricted retirement fund was originally defined as a trust set up by a bona fide agricultural, labor, business, industrial or professional association, or similar organization for the exclusive purpose of distributing to its members, or their beneficiaries, the composite profits and earnings of the trust in accordance with a retirement plan. Also by the original bills the trustee had to be a bank.

After a one-day hearing before the House Ways and Means Committee the original bills were redrafted and assigned the new numbers of H.R. 8390 and H.R. 8391. The modified bills provide for an alternative method of funding, i.e., by the purchase of "restricted retirement annuity contracts" and the requirement that a plan be sponsored by a professional or trade association has been dropped. If the trust device is used, investments are not limited to "legals" of any state and the trust instrument can set the investment rules to the extent permitted by local law as in the case of any other trust. The earnings of the restricted pension fund are exempt from income tax. Of course, when the taxpayer actually receives the deferred benefits, or when they are made irrevocably available to him, they are taxable as ordinary income. Lump-sum payments, however, are treated as long-term capital gains. Distribution of a participant's interest in the fund may not be made during his lifetime prior to age 60 except in the case of total or permanent disability. On retirement, the participant may elect lump-sum payment, installment payments or a life annuity The participant may not assign his interest, but may designate a beneficiary in case of his death.

The proposed legislation, although not restricted to self-employed professional groups, was evidently promoted by their efforts to obtain favorable tax treatment for savings scheduled for retirement.

These groups are not eligible to participate in employer pension or profit-sharing plans, nor are they eligible for Social Security benefits. Their earnings accrue in a few peak years and are not averaged over many years, as are the earnings of other workers. Consequently, they are hard hit by high tax rates during peak earning years and find it difficult to provide for their security. Many contend that it is presently impossible for them to save enough to assure security in their old age according to their present station in life.

On June 20, 1952, the Treasury Department reported on the proposed legislation to the Tax Committee. The Department indicated that the aggregate benefits of the restricted pension funds to the taxpayer would depend upon: (a) the amount of dollars invested, (b) the number of years of participation, (c) the taxpayer's income during the period of contribution and during the period of benefits, (d) the interest and income tax rates at various periods of time. The Department also stated that systematic use of the plan would increase in value as the income increased during the contributing period; that those who can now save would be the ones who could really take advantage of the proposed legislation; that higher tax rates would be necessary to off-set the loss

Issue Editor — Robert G. Taylor

of revenue; that there would be a shift in the type of preferred investments having far-reaching consequences; that current revenue loss would be over a billion dollars a year; and that administrative problems would be greatly complicated.

The suggestion was made that present tax loopholes be closed, rather than enlarged.

It is respectfully submitted that the question properly before the Committee on Ways and Means is not whether or not the administration of the plan proposed in the Keogh-Reed Bill would be difficult, nor whether an unforeseen shift in investment portfolios would result. The problem confronting the Committee is whether or not there is an unfair discrimination in the present income tax structure against the self-employed professional. If the answer is affirmative, the next question is whether or not that discrimination should be removed, and if so, by what means.

It is obvious that the self-employed professionals do not have the security and protection for their old age afforded the "employee" under our present income tax structure and Federal old-age program. To the extent that this is true, there is clearly discrimination. No properly informed individual could equitably advocate continued discrimination. The split of enlightened opinion seems to occur over the method of eliminating the discrimination. Thus, the Treasury Department's report really advocates the removal of existing tax benefits to the "employed" to equalize the tax impact. All the additional data of their report is in support of that leveling device and in opposition to equalization by increasing benefits. This view seems rather naive and unrealistic; tax deferring plans are being adopted rapidly today and will not now be abandoned by the beneficiaries without a fight. Congressional Representatives are well aware of this fact and will hardly support the unpopular proposal of the Treasury Department. Then, too, eliminating the tax deferment does not increase Social Security coverage. Surely even the Treasury Department would not propose the denial of old age and survivor's benefits to previous beneficiaries as a means of equalization.

Increasing Social Security coverage so as to include the aforementioned professional group is a potential leveling device. Since the structure of that law is geared to a $3,600 annual maximum, it would require complex alterations before being useful. Even after

such amendment, it alone would not equalize sufficiently; the "employed" would still be permitted to derive pension benefits.

Pension and profit-sharing plans are big business today. In 1951, $2,733,000,000 was contributed to private pension and welfare plans, according to a United States Department of Commerce report. There are now approximately 18,000 plans operating and new plans are being signed at a rate in excess of 300 per month. The Community Practices Survey (Merchant and Manufacturers' Association, 1725 South Spring Street, Los Angeles, October, 1951, Table 7778) shows that in the Los Angeles area approximately forty-eight per cent of the business firms engaged in manufacturing and approximately seventy per cent of the non-manufacturing firms, have retirement or pension plans. Nationally, there are approximately 8,000,000 employees covered out of a potential 60,000,000. The rapid growth is probably due in large measure to the fact that a corporation employer may give an employee a dollar credit at a total cost of as little as eighteen cents, and the individual or partnership proprietor may contribute a dollar to an employee's pension fund at a cost of as little as eight cents. The balance is derived from tax savings.

Present day employee benefit plans are varied and complex. Nevertheless, there are so many variations available to the designers of a plan which can qualify for income tax deferments that the desires of almost any company can be satisfied. Employees may also contribute to the plan, thus increasing the size of their benefits. In the United States an employee must pay his income tax before making his contribution. Only the tax on the employer's contribution is deferred. In Canada the employee's contribution, up to $900 per year, to his company's plan is deductible from his income tax. Employee benefit plans shift in large measure the burden of caring for the citizen in his non-productive years from government to private enterprise. Government is then free to carry other burdens or operate at lower cost. For the employer who has such a plan the cost of maintaining the most costly and valuable business asset, the labor supply, is properly allocated to the period in which it is used. Furthermore, a good tailor-made plan does help increase efficiency and eliminate many hidden labor costs. For the individual participant this provides a means of saving for future security that is directly related to the job of ability to earn.

Since an employee participant is allowed income tax deferment

on company contributions, there is merit to the argument that persons who cannot participate in such plans should also be permitted to defer income tax on money voluntarily set aside for their retirement and future security. Under the law as it now exists in the United States employee contributions to a qualified pension or profit-sharing plan are taxed. Since the suggested $7,500 maximum limit for self-employed exceeds any amounts that would likely be set aside for employees by company contribution under Section 165 of the Internal Revenue Code, and if the Keogh-Reed measures are adopted to end discrimination it would seem that employee contributions to a qualified pension or profit-sharing plan should also be tax exempt until the combined contributions of company and employee aggregate $7,500 per year.

Evidently, the basis for income tax deferment on company contributions is *present unavailability* to the taxpayer. When the money becomes available the tax must be paid. The employer, in turn, is permitted to deduct the contribution because it is a part of wage compensation actually paid out. *Tax deferment is not granted the employee merely because the money is put aside. It is strictly*

because the employer's contribution is never available to the employee until retirement, i.e., there is neither actual nor constructive receipt. The tax attaches only when the income is available to the taxpayer. The employer's contribution is not a gift to the employee. It is not intended as such by the employer and is not considered as such by the government, tax wise. Even if the taxpayer reports his income on the accrual basis, it does not seem that he has taxable income prior to retirement since any demand he makes for payment before such date should properly be refused, and the constructive receipt doctrine applies only to those on the cash basis. *Weil vs. Commissioner,* 173 F. 2d 805 (2d Cir. 1949).

INCOME TAX DEFERMENT VIA PRIVATE CONTRACT. Is the passage of the Keogh-Reed Bill a prerequisite to the attainment of deferred income and consequent low-tax benefits for the self-employed professional? Could an attorney, for example, by means of a deferred compensation contract made with his client, avoid higher tax rates? Assume our hypothetical attorney, Deferral Dan, who is on the cash basis, is offered the plaintiff's side of a personal injury case in January, 1952. Suppose Dan, after hearing the facts, says to the would-be plaintiff, "I will take your case on the following conditions: (a) that you now pay me $350 cash as a retainer, (b) that you contract now to pay into an irrevocable, non-amendable, non-assignable trust fund already established with Bank 'X', for my retirement at age 65, 33⅓ per cent of whatever we may recover from defendant." Assume, further, that the client agrees and an agreement in writing incorporating these terms is properly executed. The attorney then tries and wins the case, recovering a judgment for $90,000 in December, 1952. Dan includes the $350 in his tax return for 1952, but fails to include the $30,000 deposited in the trust fund. The Tax Commissioner assesses a deficiency for the contingent fee. What decision can be anticipated from the Tax Court? There are two cases in point: *E. T. Sproull, 16 T. C. 244,* (1951); and *James F. Oates, 18 T. C. #69,* promulgated, June 20, 1952. In the *Sproull* case, a corporation paid over to a trustee the sum of $10,500 in 1945 as compensation for *past services* rendered by the petitioner. The trustee was to distribute this fund to the petitioner in 1946 and 1947. The Court held the entire $10,500 was income to the petitioner in 1945. The facts do not indicate whether or not the petitioner was on the cash basis, but for purposes of clarification, the Court assumed he was. The Court apparently

considered that the doctrine of "constructive receipt" was not applicable, but felt that the doctrine of "cash equivalent" disposed of the case and upheld the Commissioner's contention. The Court felt the pertinent issues were whether or not the petitioner had received any economic benefit, and if so, in what year. It concluded the petitioner had received an economic benefit in the year 1945 equal in cash value to the $10,500. In support of the cash equivalent theory, the Court pointed out that the trust was of definite amount and that the trust indenture had no restrictions on petitioner's right to alienate or assign his interest. Apparently, it was left to counsel and client to infer that a fund uncertain in amount and non-assignable would not be taxable under either doctrine.

In the *Oates* case, the petitioners were general agents of the Northwestern Mutual Life Insurance Company and on the cash basis. After retirement, they were entitled to renewal commissions, either in cash as paid or on a deferral basis. The retiring petitioners elected to amend their contracts with the Company and to receive the renewal commissions on a deferred basis. They reported only the amount actually received annually. The Commissioner added the renewal commissions credited to the petitioners' accounts in the Company books to their income in the years credited whether or not the petitioners actually received the same in cash. Held: Petitioners taxable only on amounts actually received in the taxable year.

On the surface, the *Oates* case seems to overrule the *Sproull* decision. It is submitted, however, that they are reconcilable. The contract between the Insurance Company and the petitioners was not transferrable and no rights or interests created under it could be assigned without the written consent of the Company. In addition, the amount eventually to accrue was uncertain at the date of retirement. There was no actual or constructive receipt of anything of ascertainable value, since some of the insured might renew, some might decline and others might die prior to renewal dates. Therefore, as of the time of retirement, the cash equivalent of the beneficial interest of the petitioners was uncertain. True, tables, such as Linton's, which estimate the present value of potential renewals, are available. However, they do not accurately ascertain the year of renewal. Therefore, such tables, of aid in determining values for Federal Estate Tax purposes, are not too helpful in determining the year of inclusion for income tax purposes. The

cash equivalent theory of the *Sproull* case is apparently inapplicable. Neither the actual nor constructive receipt theories seem applicable since the petitioners had neither immediate benefits, nor the inalienable right to demand any at the time of retirement.

As the renewals were actually paid and credited, the fund for the year was certain. As of that time, the agents were beneficiaries of something of economic value. However, the trust was inalienable, irrevocable, and not subject to amendment. Petitioners were entitled to no more each year than the amount actually received and included in their return. The points of reconciliation are the uncertainty of the fund at the time of contract and the absence of a power to assign. If this is true, Deferral Dan has come within the tax avoidance lines drawn by the Court in the *Sproull* and *Oates* cases and his contentions should prevail over the Commissioner's. This result seems more just and equitable than the view taken by the Commissioner when one realizes that by the Commissioner's view, an attorney with no other income than that due from the irrevocable trust would be required to pay a tax on money not yet received with money he doesn't have. The taxpayer has only a *potential* economic gain until the money is received from the trust fund, and as the Court points out in the *Oates* case, it is this uncertainty that distinguishes the case from *Lucas vs. Earl,* 281 U.S. 111 (1930); *Helvering vs. Eubank,* 311 U.S. 122 (1940); and *Helvering vs. Horst,* 311 U.S. 112 (1940). In the *Earl, Eubank* and *Horst* cases the taxpayer sought to avoid taxation by assigning his *right* to income, whereas, in the *Oates* case, the petitioners were not entitled to receive any more than they actually reported in their annual returns.

It would seem that under the present Internal Revenue Code, pension and retirement plans are an integral part of our socio-economic structure. The Keogh-Reed measure evidently attempts to spread the benefits equally. Clearly, it is not another government hand-out plan, but rather a device for voluntary self-aid.

One of the principal purposes of higher tax rates was, and is, supposedly to reduce the threat of inflation. Tax authorities claim higher tax rates prevent excess accumulations of wealth and reduce present-day demand. This lessened demand, in turn, suppresses prices for the benefit of all. It is submitted that plans like the Keogh-Reed proposal might also be effective as an anti-inflationary device. By them, ten per cent of all the self-employed income could

be voluntarily diverted from the market place. Another valuable benefit possibly to be derived is the subsequent, anti-deflationary effect of the accumulated savings. In the event of any further recession, these accumulated savings could bolster a sagging economy.

It would seem that if self-employed professionals cannot rely on the *Sproull* and *Oates* cases, then, both on the principle of equity to all, and on the basis of sound present-day and future national socio-economic stability, measures like the Keogh-Reed Bill, permitting self-employed professional groups to make tax-free contributions to a trust fund for their future security should be endorsed.

INVESTMENT OF TAX DEFERRED EARNINGS. In the hearing before the House Ways and Means Committee on the original Keogh-Reed Bills the insurance companies represented that suitable contracts could be devised preventing premature surrender or assignment before retirement. Because of these allegations, the modified bills permit qualified individuals to purchase such restricted retirement annuities directly from insurance companies. If any security is to be given a preferred status with regard to the savings for old age on which income tax is deferred it should be government bonds. If government bonds are not preferred, then, no other bona fide investment should be.

OUTLOOK. The trend is obvious; security is the by-word. Evidently, Congress has recognized the symptoms for it has already expanded the Social Security Program and permitted the use of employee benefit plans as a method of income tax deferrment in addition to the older method of purchasing government savings bonds.

REFUSAL TO ANSWER

(Continued from page 38)

(b) JUDICIAL RECOGNITION OF PUBLIC SENTIMENT.

The Court of Appeals of the Ninth Circuit, in *Cole vs. Loew's Incorporated,*[6] stated that an inference of membership in the Communist Party could be drawn from Cole's refusal to answer questions concerning his communist affiliations. In 1947, Cole was subpoened to appear before the Committee on Un-American Activities of the House of Representatives. Along with nine other screen writers, all known as the "unfriendly" witnesses, Cole refused to answer whether or not he was a member of the Communist Party. The privilege against self-incrimination was not invoked. The Court stated:

> "We think that a jury might well find as a fact that the natural result of Cole's refusal to say whether he was or had been a member of the Communist Party was to give the Committee, and the public generally, the impression that he was a Communist,—that his refusal was for the purpose of concealing his actual membership in the Party. The events showed that this is exactly the interpretation which the public did place upon the conduct of Cole and of the other witnesses who took a like stand." [7]

In *Cole vs. Loew's, Inc., supra,* Judge Clarence M. Hanson, of the Superior Court of Los Angeles County, held that the Court takes judicial notice that a person who refuses to state whether he is a communist is regarded by the American public as being a communist. Judge Hanson stated:

> "But the contention ignores a very salient fact, which courts today take judicial notice. That fact is that a person who was unwilling to state publicly, under any and all circumstances, whether he is or is not a communist, is regarded in America as being a communist." [8]

The Cole case involved a direct refusal to answer questions concerning Communist affiliation. On the other hand, *RKO Radio Pictures, Inc., vs. Jarrico, supra,* was concerned with inferences created by refusal to answer under claim of the privilege. Jarrico, also a screen writer, had been accused of being a communist before

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[6] 185 F. 2d 641 (9th Cir. 1950).
[7] Id. at 649.
[8] *Cole v. Loew's, Incorporated,* Superior Court of Los Angeles County, California, No. 541,446, 16 Labor Cases (CCH) par. 64, 974, page 75, 091.

hearings of the House Un-American Activities Committee. Instead of either denying or affirming the accusation, he declined to answer any questions relative to his communist affiliation on the ground that his answer might tend to incriminate him.

The poll taken in Muncie, Indiana, was received in evidence by the Court. Judge Orlando H. Rhodes stated that the Court would consider the poll:

> ". . . in connection with judicial notice, and in that connection, the Court judicially notices that one, who under the circumstances as did the defendant in this case, asserts the privilege of the Fifth Amendment, is believed to be by the American people, either, first, a communist, or that he has been a communist, or he is a communist sympathizer, or any combination of the three." [9]

The Court found as a fact that:

> "The great majority of American people believe that one who refuses to answer under oath the question of whether or not he is a member of the Communist Party on the ground that to answer this question might tend to incriminate him, either is a communist, has been a communist, or is a communist sympathizer, or any combination of the three." [10]

From the above finding of fact, the Court drew the following conclusion of law:

> "The American people may draw an unfavorable inference from the claiming of the privilege against self-incrimination by a witness without violating the Fifth Amendment of the Federal Constitution or any other provision of law or public policy . . ." [11]

INFERENCES — JUDICIAL RECOGNITION

(a) CRIMINAL CASES.

It has been held that claim of the privilege does not constitute an admission of guilt.[12] However, is an inference derived from invoking the privilege admissible in the courtroom?

An inference from claim of the privilege is admissible in the courtroom if comment to the jury is allowed on the fact that the accused refused to testify under claim of possible self-incrimination.

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[9] *RKO Radio Pictures, Inc. v. Jarrico, supra,* Decision of the Court, pp. 1, 2.
[10] *RKO Radio Pictures, Inc. v. Jarrico, supra,* Finding of Fact No. XII.
[11] *RKO Radio Pictures, Inc. v. Jarrico, supra,* Conclusion of Law No. V.
[12] *Healey v. United States,* 186 F. 2d 164 (9th Cir. 1950). The Court stated on pages 167 and 168:

> "It is elementary that in claiming the right not to testify against himself the witness admits no guilt. He well may be entirely innocent of the crime for which he

In the majority of states, no inference can be drawn from claim of privilege. In these states comment by neither judge nor prosecuting attorney is permitted.[13] However, this does not prevent the juror from drawing unfavorable inferences of his own.

In England comment by the judge on the accused's claim of privilege is allowed, although prohibited to the prosecuting attorney.[14] In California,[15] and in a growing number of states,[16] comment by both judge and prosecuting attorney is allowed in criminal cases.

Article 1, Section 13, of the California Constitution, provides as follows:

"In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the Court and by counsel, and may be considered by the Court or the jury."

(b) CIVIL CASES

In civil cases, the California courts have held that an unfavorable inference may be drawn against a party from his refusal to testify on the ground of possible self-incrimination.[17]

In *Fross v. Wotton*,[18] the California Supreme Court stated that an inference that conveyances were made in fraud of creditors was inescapable from the defendant's refusal to testify under claim of the privilege against self-incrimination. The Court stated as follows:

"Here the claim of privilege is based upon the very fact and issue, the only excuse for silence is that an explanation of the real nature of the transaction would disclose conveyances made in fraud of creditors. The inference that the conveyances were not *bona fide* is inescapable, nor can we see that it is necessary to ignore it in order to preserve the constitutional privilege of the witness. The privilege is not for the benefit of the guilty nor to enable the claimant to prevail in civil suits by means of it."[19]

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fears prosecution. His situation may be like that of the law school discussed case of the man who has made threats against the life of a murdered man and, happening along after the murder, pulls the knife from the deceased's body and is seen clutching it. Clearly it is no admission of guilt to refuse to testify to the grand jury concerning such threats."

13 8 Wigmore, *Evidence*, 412 (3d Ed. 1940).

14 8 Wigmore, *Evidence*, 410 (3d Ed. 1940).

15 *People v. Richardson*, 74 Cal. App. 2d 528, 169 P. 2d 44 (1926); *People v. Waller*, 14 Cal. 2d 693; 96 P. 2d 344 (1939); *People v. Anderson*, 90 Cal. App. 2d, 326, 202 P. 2d 1044 (1949).

16 8 Wigmore, *Evidence*, 412 (3d Ed. 1940); *State v. Aime*, 62 Utah 476, 220 Pac. 704; *O'Loughlin v. People*, 90 Colo. 368, 10 Pac. 2d 543.

17 *Fross v. Wotton*, 3 Cal. 2d 384, 44 P. 2d 350 (1934); *Nelson v. Southern Pacific Co.*, 8 Cal. 2d 648, 67 P. 2d 682 (1937).

18 3 Cal. 2d 384, 44 P. 2d 350 (1934).

19 *Idem*, at 395.

(c) ANALOGY TO WITNESS BEFORE GRAND JURY

The witness before a Congressional Committee is somewhat analogous to a witness before the grand jury. A witness before the grand jury has not been confronted with the evidence against him and has no right of cross-examination.[20] The witness has the right to refuse to answer questions on the ground of possible self-incrimination. The witness before a Congressional Committee, in most cases, also has not been confronted with evidence against him and likewise has no right to cross-examine his accusers. He too can invoke the privilege against self-incrimination.

Accordingly, it would seem that comment at a trial on a witness' claim of the privilege before a Congressional Committee should be governed by the same rules that relate to comment on a witness' claim of the privilege before the grand jury.

Where the privilege is invoked at a hearing of the grand jury, this fact can be used at the trial for impeachment in "comment" states.[21] Impeachment occurs by showing that the defendant has told a different story at the trial than he related to the grand jury. It is argued that if the alibi at the trial is true, there was no reason to claim the privilege before the grand jury.

An accused can be impeached by evidence of a prior claim of the privilege only if he chooses to testify at the time of trial. In a "comment" state a defendant who invoked the privilege at a proceeding before trial is in somewhat of a dilemma. If he does not testify at the trial, comment on his failure to do so is allowed. However, if he chooses to become a witness, comment on his prior claim of privilege is allowed.

INFERENCES — LOGICAL

Wigmore states, and many Courts agree, that claim of the privilege logically involves a confession of the fact. Wigmore argues that:

"The question whether an inference may be drawn from a person's exercise of his privilege is one which may well puzzle by its anomalies.

"Both principle and expediency are involved. The layman's natural first suggestion would probably be that the claim was a clear confession of the incriminating fact. The lawyer's natural first answer would certainly be that then the privilege would thereby be annulled. Both of these have a truth, but only a partial truth. The

[20] 38 C. J. S. 1038, 1039.

[21] *Nelson v. Southern Pacific Co.*, 8 Cal. 2d 648, 67 P. 2d 682 (1937); *People v. Byers*, 5 Cal. 2d 676, 55 P. 2d 1177 (1936); *People v. Kynette*, 15 Cal. 2d 731, 104 P. 2d 749 (1940).

nature of the issue should not be lost sight of. It is not a question of mere reasoning, — of the recognition that an inference is open. 'Logic is logic', ever since the days of the One-Hoss Shay; and it is on that score impossible to deny that the very claim of the privilege involves a confession of the fact.

" 'Were you assisting the defendant at the time of the affray?' this may be answered 'yes' or 'no'; if 'no', the fact is not incriminating and the privilege is not applicable. If 'yes', the fact is incriminating and the privilege applies.

"The inference, as a mere matter of logic, is not denied."[22]

Therefore, accepting Wigmore's argument, if the witness before a Congressional Investigating Committee is not a communist, his testimony cannot incriminate him and he has no reason to invoke the privilege. Accordingly, if he claims the privilege, he must be a Communist.

Clearly, the inference that the witness is a communist is a probable, if not the most probable, conclusion to be drawn. However, the privilege can be claimed for other reasons by persons who are not, and have never been members of the Communist Party.

For example, the witness may have been accused of being a communist by another person appearing before the committee. To deny membership in the Communist Party might be considered tantamount to inviting a perjury prosecution. For financial, health or other reasons, the witness may not wish to incur the risk of defending himself in a criminal action. Accordingly, he invokes the privilege. Another witness may feel, even though the courts have held otherwise,[23] that the inquiry is beyond the scope of the Congressional Committees. Thus, rather than deny membership, he antagonistically invokes the privilege to express his opposition to the Committee.

In both of these cases, the non-communist witness has claimed the privilege and refused to answer questions concerning his membership in the Communist Party. The public may now regard him as a communist. Indeed, Wigmore would have us believe that the logical conclusion to be drawn from claim of the privilege is that he is a communist. However, as the above examples indicate, this is not necessarily the case.

It is to be noted that an important distinction exists here. The privilege can be invoked only if the answer would tend to be incriminating. Accordingly, it might be argued that if the witness is

[22] See Note 13.

[23] *Lawson v. United States*, 176 F. 2d 49 (D. C. Cir. 1949); *Trumbo v. United States*, 176 F. 2d 49 (D.C. Cir. 1949).

not a Communist, the answer cannot incriminate him. Thus, it would follow that the witness who invoked the privilege is either a Communist or a perjurer.

Chief Justice Marshall in *United States v. Burr*[24] stated that a witness who invokes the privilege may be a perjurer. Thus,

". . . if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath . . ."

However, the fact that the witness who invokes the privilege may be neither a Communist nor a perjurer was clearly pointed out in *Estes v. Potter,* 183 F. 2d 865 (5th Cir. 1950). The Court stated:

"If affiliation with the Communist Party is sufficient ground for deportation of an alien for the reasons urged, it is a reasonable ground for a citizen to fear a prosecution for conspiracy. If the appellant denies that he is a Communist, he may be prosecuted for perjury; if he admits it, he may be prosecuted for belonging to a group that encourages the overthrow of governments by force . . ."

Under these circumstances, it would appear that there are situations where the witness is acting rightfully on his claim of the privilege and is neither a Communist nor a perjurer. This would only occur where either an affirmation or a denial would tend to incriminate the witness.

CONCLUSION

Accordingly, it appears that the witness who invokes the privilege in refusing to answer questions relating to Communist affiliation can be either (1) a Communist, (2) a perjurer in wrongfully claiming the privilege, or (3) neither a Communist nor a perjurer because any answer which he might give would tend to incriminate him. The public, apparently, does not make this distinction. Instead, a considerable majority, according to a recent poll, adopts the conclusion that such a witness is in fact a Communist.

The courts, in turn, recognize the public sentiment, but jurisdictional rules control whether or not inferences raised in the public mind are admissible in the courtroom.

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[24] 25 Fed. Cas. 38, 40, No. 14692e.

BROTHERS-IN-LAW

(Continued from page 40)

established for any committee and are not so restrictive that they cannot be adopted in toto and leave the committee quite free to make any reasonable investigation.

"We are not criticizing any of the suggestions made in various Congressional bills, nor have we gone as far as, or in as great detail as, some of these suggestions. However, we believe that the rules proposed by your Committee are reasonable, and while, of course, we cannot attempt to tell Congress what its Committees should do, we feel that our recommendations are the minimum that an Investigating Committee should adopt.

"We realize that a rule with respect to television may cause considerable debate, but believe that our recommendation in this respect should be made, even though it is quite likely that many committees may not adopt it.

"Entirely apart from any policy which Committees of Congress may have, we, nevertheless, as your Committee, believe it our duty to report to you such rules which, in our opinion, will protect witnesses and lawyers before Congressional Investigating Committees."

The rules proposed by the committee and approved by the board of directors of the association are set forth below.

RULES OF PROCEDURE FOR CONGRESSIONAL HEARINGS

1. *Information for Witnesses.*

Witnesses should be advised of the contents of the law or resolution authorizing the instant investigation. Such witnesses should also be advised of their constitutional protection against being forced to give self-incriminating testimony.

2. *Right to Counsel.*

(a) *Counsel for Witness*

At every hearing (public or executive), every witness shall have the right to counsel. At any examination or other proceedings (other than a hearing), every witness when interrogated by a member of the Committee or a member of its staff, shall be informed that he has the right to counsel.

(b) *Participation of Counsel*

Counsel shall have the right on behalf of a witness to participate in hearings in the following manner:

1. To advise a witness of his constitutional and other rights,

2. To make objections to questions and procedures and to submit legal memoranda in support of objections (the objections shall be incorporated in the transcript of the proceedings and such memoranda shall be filed with the record),
3. To cross-examine witnesses who testify with respect to counsel's client, where such questions are relevant to the inquiry and within reasonable limits fixed by the committee,
4. To file as part of the record a written statement of counsel's client explaining or refuting any statements or testimony relating to said witness, providing such statement shall not contain any scurrilous or defamatory matter.

(c) *Conduct of Counsel*

Counsel for a witness shall conduct himself in a professional, ethical and proper manner. His failure to do so shall, upon a finding to that effect by a majority of the committee, subject such counsel to disciplinary action, which may include warning, censure, removal of counsel or a recommendation of contempt proceedings. In case of removal of counsel, the witness shall have a reasonable time to obtain other counsel. Should the witness fail or refuse to obtain the services of other counsel within a reasonable time, the hearings shall continue and the testimony of such witness shall be heard without benefit of counsel.

Counsel for the committee shall confine his questions to matters pertinent to the inquiry and shall not propound questions which would elicit responses unnecessarily reflecting adversely upon the character and reputation of any person.

3. *Hearings should be public, a complete record kept and transcript available.*

All hearings should be public, except as may be determined by majority vote of the committee. A complete and accurate record shall be kept of all testimony and proceedings at hearings (both public and in executive session). Any witness, or his counsel, at the expense of the witness, may obtain a transcript of the testimony of the witness under any circumstances and where a witness has been accused of a criminal offense, he, or his counsel, at his own expense, may obtain a transcript of the entire record relating to such accusation, except that he may not obtain a transcript of the record if a majority of the committee believes that the security of the nation be involved.

4. *Use of Executive Session to avoid unwarranted injury to reputation.*

If a majority of the committee believes that the interrogation of a witness in a public hearing might unnecessarily or unjustly injure his reputation or the reputation of other individuals, the committee shall interrogate such witness in an executive session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.

5. *Rights of persons affected by a hearing.*

Any person directly or indirectly affected by a hearing (whether public or in executive session):

(a) who believes that his character or reputation has been adversely affected or to whom improper or degrading conduct, not itself illegal, has been imputed by any other person during the course of a hearing, shall have the right to appear in person or by counsel before the committee, to give testimony germane to the subject and to file a statement with respect to the derogatory testimony; and

(b) to whom has been imputed illegal conduct by any other person during the course of a hearing shall have the right to

appear in person or by counsel before the committee to give testimony germane to the subject, to file a statement with respect to the derogatory testimony and, with the approval of a majority of the committee, to cross-examine such other person and to petition for and receive compulsory process for obtaining witnesses in his favor and the opportunity for the hearing of testimony from such witnesses.

6. *Number of Members at Hearings.*

No hearing shall be convened without a majority of the committee present. No hearings shall be conducted without the attendance of at least two members of the committee.

7. *Subpoenas, Searches and Seizures.*

(a) Subpoenas shall be signed and issued by the chairman of the committee or other member of the committee designated by the chairman.

(b) Any person upon whom any subpoena is served may appear before the committee and move that the subpoena be quashed or modified. Such motion shall be ruled upon by a majority of the committee.

(c) Counsel shall be permitted to raise questions as to unreasonable searches and seizures of persons, papers and effects, and by majority vote the committee shall rule with respect to questions raised.

(d) Subpoenas shall comprise (1) subpoenas and [sic] testificandum and (2) subpoenas duces tecum for the production of books, records, documents and other objects. The subpoena duces tecum should describe with all practical particularity the books, records, documents and other objects which the witness is called upon to produce.

8. *Rules of Evidence.*

A witness shall be limited to testimony of substantial probative force and, where consistent with reasonable expedition, shall also be limited to the testimony of facts within his knowledge. Judicial rules of evidence need not apply. The committee shall rule upon the admissibility of all evidence.

9. *Pertinency of Questions.*

A witness, or his counsel, may object to a question on the grounds of pertinency. In the event that the committee overrules the objection and orders the witness to reply, the committee shall state the basis upon which such question is pertinent. A witness, or his

counsel, shall have the right to note an exception to such ruling and to state briefly the grounds of his objection.

10. *Limitation upon reports reflecting upon individual reputations.*

No report or other statement reflecting adversely upon the reputation of any individual shall be issued or made public by the committee or any member of its staff, unless

(a) such report or statement is germane and pertinent to the purpose of the hearing and has been so determined by majority vote of the committee;

(b) a majority of the members of the committee have consented to the issuance of such report or statement; and

(c) such report is based upon evidence presented at public hearings and not upon information obtained at a preliminary conference or through private investigation.

11. *Television Hearings.*

Any witness whose testimony is to be televised shall be notified in writing by the committee at least 24 hours prior to the time specified by the committee for the taking of his testimony. A witness may request that his testimony not be televised and the committee shall accede thereto, provided such request be made to the committee at least 12 hours prior to such hearing.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, AND CIRCULATION REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233)

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1. The names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher—Los Angeles Bar Association, 510 S. Spring St., Los Angeles 13, Calif.
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Business Manager—Robert M. Parker, 241 E. Fourth St., Los Angeles 13, Calif.

2. The owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding 1 per cent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a partnership or other unincorporated firm, its name and address, as well as that of each individual member, must be given.) W. I. Gilbert, Jr., President, 458 S. Spring St., Los Angeles 13, Calif., William P. Gray, Secretary, 458 S. Spring Street, Los Angeles 13, Calif., Frank C. Weller, Treasurer, 111 W. Seventh St., Los Angeles 14, Calif., Los Angeles Bar Association, Publisher, 510 S. Spring St., Los Angeles 13, Calif.

3. The known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.) NONE.

4. Paragraphs 2 and 3 include, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting; also the statements in the two paragraphs show the affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner.

5. The average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the 12 months preceding the date shown above was: (This information is required from daily, weekly, semiweekly, and triweekly newspapers only.)

ROBERT M. PARKER,
Business Manager.

Sworn to and subscribed before me this 1st day of October, 1953.

[Seal] MARGUERITE F. CRIPPS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 3, 1956.